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MOHD IMRAN MOHD RAMLY & ANOR v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
ZABARIAH MOHD YUSOF JCA
B HASNAH MOHAMMED HASHIM JCA
[CRIMINAL APPEALS NO: J-05(M)-142-04-2017
& J-05(M)-144-04-2017]
3 JUNE 2020

C ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Murder of child – Accused persons sentenced to death – Whether there was common intention to commit murder – Whether there were direct/circumstantial evidence – Whether cumulative effect of all evidence led to irresistible conclusion that accused persons committed murder – Whether circumstantial evidence enough to convict*
D *accused persons – Whether conviction based on circumstantial evidence good in law – Whether conviction and sentence safe – Penal Code, ss. 34 & 302*

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Murder of child – Whether there was intention to kill – Whether there were direct/circumstantial evidence – Whether cumulative effect of all evidence led to irresistible conclusion that*
E *accused persons committed murder – Whether circumstantial evidence enough to convict accused persons – Whether conviction based on circumstantial evidence good in law – Whether conviction safe*

CRIMINAL LAW: *Penal Code – Section 34 – Common intention – Murder of child – Whether common intention between accused persons to commit murder*
F *established – Whether conviction safe*

EVIDENCE: *Circumstantial evidence – Conviction – Murder of child – Conviction based on circumstantial evidence – Whether there was intention to kill – Whether there were direct/circumstantial evidence – Whether circumstantial evidence*
G *enough to convict accused persons – Whether conviction based on circumstantial evidence good in law – Whether cumulative effect of all evidence led to irresistible conclusion that accused persons committed murder – Penal Code, ss. 34 & 302*

EVIDENCE: *Adverse inference – Evidence Act 1950, s. 114(g) – Failure to call witness – Whether material witness – Whether detrimental to prosecution's case*

H The first appellant had brought his son ('deceased'), who allegedly fainted, to a clinic and following an examination, the doctor at the clinic ('PW2') found that he had passed away. The deceased's body was sent to the hospital where the hospital's doctor ('PW4') was told by the first appellant that the deceased suffered from asthma, had difficulty breathing and passed away in

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the ambulance on the way to the hospital. However, after carrying out an examination and having discovered several bruises on the deceased's body and an indentation in his brainpan, PW4 believed that the deceased was abused. PW4 then contacted the forensics department at the hospital with a view that a post-mortem be conducted to ascertain the cause of death. The following day, PW4 discovered that the deceased's body was no longer at the hospital. The deceased was removed on the instructions of the police based on a letter brought by the first appellant. PW4 immediately contacted the police to reclaim the deceased's body for post-mortem. The police retrieved the deceased's body and a post-mortem carried out revealed (i) more than 50 multiple blunt type injuries on the deceased's head, face, body, hands and feet; (ii) multiple injuries over the deceased's head resulting in skull fracture, profound subdural haemorrhage and extensive brain swelling which eventually led to his death; and (iii) the head injury due to the blunt force was fatal in nature. The appellants were charged at the High Court for, in furtherance of a common intention, committing the murder of the deceased, an offence under s. 302 read together with s. 34 of the Penal Code ('PC'). Satisfied that the prosecution had established a *prima facie* case, the trial judge called the appellants to enter their defences. According to the first appellant, (i) the deceased lived with him since he was born and when the first appellant goes to work, he would send the deceased to a babysitter ('Kak Maria'); (ii) on the fateful day, when he picked up the deceased from Kak Maria's house, upon seeing the first appellant, the deceased ran towards him and fell; (iii) the deceased later had an asthma attack and his condition worsened; (iv) the first appellant took the deceased to the clinic where PW2 examined the deceased and instructed that he be sent to the hospital where he was admitted to the intensive care unit and eventually passed away; and (v) a medical officer instructed him to request for a burial permit from the police. As far as the second appellant was concerned, the evidence that connected her with the deceased was the testimony of the orthodontist who testified that the U-shaped bite marks on the deceased's arms corresponded to the crown pattern of the second appellant's teeth. In her defence, the second appellant testified that (i) the first appellant was merely a friend and he was not her boyfriend; (ii) she had never resided with the first appellant and had never been responsible for the caring of the deceased; and (iii) she denied the bite marks on the deceased was caused by her. At the conclusion of the trial, the trial judge found that the appellant failed to cast a reasonable doubt on the prosecution's case. The appellants were convicted for the offence and sentenced to death. Hence, the present appeals. In support of their appeals, the appellants submitted that (i) there was no direct evidence to show that the first and/or the second appellants had caused the injuries and/or any act

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which caused injuries to the deceased. The conviction was purely based on circumstantial evidence which was not enough to convict the first and/or the second appellants; and (ii) the trial judge failed to invoke adverse inference under s. 114(g) of the Evidence Act 1950 ('Act') for the failure of investigation of Kak Maria and for the prosecution to produce her as a witness to give evidence.

Held (dismissing first appellant's appeal; allowing second appellant's appeal) Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) The evidence in this case was not direct as there were no witnesses who saw any of the appellants inflicting injury upon the deceased. However, in the absence of direct evidence, a conviction could be secured through circumstantial evidence. The trial judge had taken into consideration the conduct of the first appellant in hastening the burial of the deceased and that the first appellant proceeded with undue haste to lodge a police report to place on record the fact that the deceased had died of asthma complications in order to obtain burial permit. The deceased's body was taken from the mortuary by the first appellant as he did not want a post-mortem to be conducted and wanted the burial of the deceased as soon as possible. The inevitable conclusion was that the death of the deceased was caused by the head injuries sustained by him, not due to a fall. A conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. The cumulative effect of the evidence in the present appeal led to an irresistible conclusion that the first appellant had, without a doubt, caused the death of the deceased. (paras 23, 27, 32 & 33)

(2) Although there was evidence from the orthodontist that the bite marks pointed to the second appellant, the cause of death of the deceased was not due to the bite marks but the trauma to the head due to a blunt object. There was no evidence, be it direct nor circumstantial, to link the second appellant to the injuries which caused the death of the deceased. It had not been established that the second appellant stayed/lived with the first appellant or that she was involved in taking care of the deceased at the material time. The charge against the second appellant was under s. 34 of the PC, namely common intention to commit murder. The trial judge did not consider this aspect of the charge and neither was there any findings as to whether the elements of common intention was satisfied. The trial judge erred in convicting the second appellant of the charge preferred. The circumstantial evidence

relied on by the prosecution in respect of the second appellant merely raised suspicion and doubts. Suspicion, no matter how grave, was insufficient to form a conviction. (paras 35 & 37-39)

(3) The trial judge did not err when His Lordship found that the issue on s. 114(g) of the Act on the failure to call Kak Maria had no leg to stand on. The trial judge had considered the evidence of the deceased's mother ('PW7') that the deceased was in the care of the first appellant from September 2013 until the time of his death. During the period when the deceased was under the care of Kak Maria, save and except one occasion when the deceased was scratched by a cat, there had never been any incident where the deceased suffered any cuts, injuries or any bruises on his body. It was also in PW7's evidence that after the first appellant took custody of the deceased in September 2013 onwards, Kak Maria no longer babysat the deceased. In addition, the appellant had never informed to the police during investigations that the deceased was taken care by Kak Maria at the material time. As it was the case of the defence that Kak Maria was babysitting the deceased at the relevant time, it was for the defence to call Kak Maria to prove their case. (paras 43-45 & 47)

(4) There were no merits in the first appellant's appeal. The decision of the trial judge was affirmed. However, there was appealable error on the part of the trial judge in convicting the second appellant. The second appellant had successfully raised reasonable doubt on the prosecution's case. It was unsafe to convict the second appellant on the charge under s. 302 read together with s. 34 of the PC. The conviction and sentence of the second appellant by the High Court was set aside. The second appellant was discharged and acquitted. (paras 48 & 49)

Case(s) referred to:
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Jayaraman & Ors v. PP [1982] 1 LNS 126 FC ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Magendran Mohan [2005] 3 CLJ 592 HC ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Virsa Singh v. State of Punjab AIR 1991 SC 467 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, ss. 34, 300(c), 302

For the 1st appellant - Nik Mohamed Ikhwan Nik Mahamud & Normah Mohd Desa; M/s Nik Ikhwan & Co
For the 2nd appellant - Zamri Ibrahim; M/s Hanif & Co
For the respondent - Mangaiarkarasi Krishnan; DPP

[Editor's note: For the High Court judgment, please see PP v. Mohd Imran Mohd Ramly & Anor [2017] 1 LNS 614 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] The appellants were charged as follows:

> Bahawa kamu bersama-bersama diantara 16.12.2013 jam lebih kurang 12.00 tengah malam hingga 19.12.2013 jam lebih kurang 6.45 petang bertempat di No. 2-22, Apartment Sri Putra, Jalan Meranti 7, Bandar Putra Kulai, dalam daerah Kulai, dalam Negeri Johor Darul Takzim dalam meneruskan niat bersama, kamu semua telah membunuh dengan menyebabkan kematian ke atas Muhammad Aqeef Adam bin Mohd Imran (No. KP: 100927-01-0369) dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan di baca bersama dengan Seksyen 34 Kanun Keseksaan.

[2] At the conclusion of the trial, the learned High Court Judge found the appellants guilty as charged and convicted them accordingly. The appellants were sentenced to the mandatory death penalty as mandated under s. 302 of the Penal Code. Aggrieved with the conviction and sentence, each of the appellant appealed separately to the Court of Appeal *vide* Appeal No. J-05(M)-142-04-2017 (for the first appellant) and Appeal No. J-05(M)-142-04-2017 (for the second appellant). We heard both the appeals on 5 August 2019 and after perusing the records of appeal and considering both the written and oral submissions of the learned Deputy Public Prosecutor (DPP) and learned appellants' counsel, we dismissed the first appellant's appeal and allowed the second appellant's appeal. In respect of the first appellant we affirmed the decision of the High Court. With regards to the second appellant's appeal, we allowed the appeal and set aside the conviction and sentence. We now give our reasons.

Material Facts

[3] The detailed facts have been set out in the learned judge's grounds of judgment and we don't intend to repeat them here. However, for the purpose of this appeal we will only set out in brief the relevant facts required for our grounds.

[4] On 19 December 2013 at around 6.45pm, the first appellant brought the deceased to Klinik Raudah. According to Dr Raja Zarina bt Raja Ismail ("PW2") the first appellant came into the clinic in a state of panic carrying the deceased on his shoulder. He asked for help as his son, the deceased, according to him, had fainted. PW2 immediately examined the deceased and

found him motionless, his skin had turned greyish, an indication that the child had died. PW2 tried to move the deceased by prodding his shoulder, shining a torch light directly into his eyes and examined for breathing but there was no reaction. PW2 called the paramedics and when they arrived at the clinic, she informed them that the child had passed away and ought to be taken to the hospital.

[5] The second appellant then came to the clinic and enquired what had happened to the deceased. PW2 told her that the child had died and she then asked the second appellant of the bruises found on the deceased body; on his head, left cheek, hands, legs and his back. The second appellant informed PW2 that she does not know what had happened as the deceased was looked after by the first appellant.

[6] Dr Sridharan a/l K Vijan ("PW4") testified that on 19 December 2013 at around 7.30pm, he received a patient (the deceased), aged around three years old, from the paramedics. The first appellant accompanied the deceased. PW4 examined the pulse of the deceased, performed an electro cardiogram (ECG) and discovered that there was no heartbeat. PW4 certified the deceased as dead on arrival at the Hospital Kulai. PW4 met with the first appellant in order to find out what had happened. The first appellant was emotional at the time and explained to PW4 that the deceased suffered from asthma, had difficulty breathing and passed away in the ambulance on the way to the hospital.

[7] PW4 conducted an examination on the deceased and discovered several bruises on his body as well as an indentation in the brainpan of the deceased. The first appellant informed PW4 that the injuries were the result of a fall whilst the deceased was riding his bicycle. PW4 noted in the BID card (P8) that "in pending post-mortem to verify cause of death" as he was of the view that the death of the deceased was not due to asthma but due to abuse. PW4 then contacted the forensics department at the Sultanah Aminah Hospital with a view that a post-mortem be conducted to ascertain the cause of death.

[8] The following day, on 20 December 2013 at around 7.15am, when PW4 arrived at work, the staff at the emergency ward informed him that the deceased was no longer at Kulai Hospital and was taken out from the hospital at about 1.30am. The deceased was removed on the instructions of the police based on a letter brought by the first appellant. He immediately instructed the emergency ward staff to contact the police in order for them to reclaim the body of the deceased with a view to conduct a post-mortem. PW4 lodged a police report (P9) regarding the incident.

[9] The first appellant did not want a post-mortem to be conducted on the deceased and instead wanted to bury the deceased as soon as possible. Upon instruction from his superiors, Sarjan N R Kumarasan a/l N Ramasamy ("PW9") had issued a burial permit to the first appellant on 19 December 2013 at around 11.40pm. On 20 December 2013 at around 7.30am, PW9 received a telephone call from PW4 informing him that the death of the deceased was due to suspected foul play. PW9 immediately tried to contact the first appellant but was informed by the second appellant that the body of the deceased was to be buried at the Saleng Cemetery.

[10] PW9 immediately proceeded to the Saleng Cemetery to retrieve the deceased's body in order for the post-mortem to be conducted. Upon his arrival at the cemetery, the body of the deceased had just arrived. PW9 apprehended the first appellant and brought the deceased body to the Kulai Hospital for post-mortem to be conducted.

[11] Hj M Ismail bin Ahmad @ Sarbini @ Muhammad ("PW8"), the "muezzin"/imam, of the mosque at the appellants' residential area testified that he was contacted by the first appellant on 20 December 2013 at around 1.30am. The first appellant had informed PW8 that his son had passed away and requested that the burial to be expedited. PW8 asked the first appellant to go to the Al Mubarak Mosque at dawn to discuss the burial arrangements.

[12] On 20 December 2013 at around 6.30am, the first appellant came to the Al Mubarak Mosque and met with PW8. Subsequently PW8 together with the mosque committee went to the house of the first appellant at around 6.45am and met the second appellant, who was alone at home. The body of the deceased was laid on a mattress in the living room area. When the second appellant was asked where her relatives were, she responded that they were busy and could not attend the funeral.

[13] On the same day at about 7.50am, PW8 instructed the first appellant to bring the deceased's body to the mosque to be washed and clothed. The first appellant brought the body to the mosque in a car driven by the second appellant. PW8 bathe the body of the deceased and noticed several bruises on the face, the arm, chest, and front and back of the deceased. The body of the deceased was then brought to the Saleng Cemetery for burial. Before the deceased's body was laid to rest in the grave, PW9 arrived and took the body away for police investigation.

[14] The mother of the deceased, Rosmaria binti Abu Darim ("PW7"), testified that on 20 December 2013, she was informed of the death of the deceased. She went to the mortuary at Kulai Hospital to view the body. She also testified that since September 2013 until the day he passed away, the

deceased was in the care of the appellants. The deceased was an asthma patient but the cause of death was head injuries resulting from blunt force trauma and not asthma.

[15] Dr Khairul Annuar bin Zinun ("PW5") testified that he performed the post mortem on the deceased on 20 December 2013 at around 4pm. The post-mortem report (P10) in summary revealed that there were more than 50 multiple blunt type injuries found on the head, face, body, both hands and feet of the deceased. The deceased sustained multiple injuries over the head resulting in skull fracture, profound subdural haemorrhage and extensive brain swelling, which eventually led to his death. The head injury due to blunt force trauma was fatal in nature.

[16] At the end of the prosecution's case the learned judge found that the prosecution had proven all the four elements as laid out in *Virsa Singh v. State of Punjab* AIR 1991 SC 467:

(i) bodily injuries present;

(ii) the nature of the injuries proven;

(iii) an intention to inflict that particular bodily injuries; and

(iv) the injuries sufficient to cause death in the ordinary course of nature.

[17] Under the circumstances, the learned trial judge found that the prosecution had succeeded in proving a *prima facie* case against the appellants for the charge of murder under s. 300(c) of the Penal Code and called upon the appellants to make their defence.

The Defence Case

[18] The first appellant testified that when he goes to work he would send the deceased to a babysitter known as 'Kak Maria'. On that fateful day, 19 December 2013, he came back from work at 6pm, picked up the deceased from Kak Maria's house and they went home. According to the first appellant when he picked up the deceased from the babysitter, the deceased was riding a bicycle and, upon seeing him the deceased ran towards him and fell. Later the deceased had an asthma attack and the first appellant applied some ointment on the deceased's chest but his condition worsened. He then took the deceased to the Klinik Raudah where a doctor examined the deceased and instructed the deceased to be sent to the Kulai Hospital where the deceased was admitted to the intensive care unit (ICU). After about an hour, the doctor called him in and informed him that the deceased had passed away.

[19] According to the first appellant, a medical officer instructed him to go to the police station to request for a burial permit. He denied he had committed murder of the deceased as he said that the deceased was his own child, and had lived with him since the deceased was born as his mother, PW7 lived in Penang. When he goes to work the deceased was looked after by the babysitter, Kak Maria.

[20] The second appellant testified the first appellant is merely a friend and that she did not know much about his family except that he was divorced and has a child. She told the court that the first appellant's first child had passed away and that Adam, the deceased was his second child. She further testified that she never resided with the first appellant and never been responsible for caring of the deceased. She denied that the bite marks found on the deceased was caused by her and that she had kicked and punched the deceased from September 2013 until he died. She also denied that the first appellant is her boyfriend as she was already engaged to Zulaini bin Che Harun (DW4).

[21] At the conclusion of the trial, the learned judge found that the appellants failed to cast a reasonable doubt on the prosecution's case for murder and accordingly convicted both the appellants and sentenced them to suffer death by hanging.

The Appeal

[22] Before us, learned counsel for the appellants canvassed the following two grounds in urging us to allow the appeal:

(a) the learned trial judge erred in law and in fact when His Lordship convicted the appellants of the offence of murder without appreciating the evidence submitted that there was no direct evidence to show that the first appellant and/or the second appellant had caused the injuries and/or any act which caused injuries to the deceased. The conviction was purely based on circumstantial evidence which was not enough to convict the first appellant and/or the second appellant; and

(b) the learned trial judge failed to invoke adverse inference under the provision of s. 114(g) of the Evidence Act 1950 for the failure of investigation of the existence of 'Kak Maria', the babysitter, and for the prosecution to produce her as a witness to give evidence.

Our Decision

No Direct Evidence To Show That The Appellants Had Caused The Injuries

[23] It is trite that intention to kill may be inferred from the surrounding circumstances, including the weapon used, the nature of the injuries inflicted, and the manner in which the injuries were inflicted. The burden of proving this element lies on the prosecution and must be proved beyond reasonable

doubt either by direct evidence or may be inferred or concluded from the circumstantial evidence as in the present appeal. It is not in dispute that the evidence in this case is not direct as there were no witnesses who saw any of the appellants inflicting injury upon the deceased. However, even in the absence of direct evidence, a conviction can be secured through circumstantial evidence (see *Sunny Ang v. PP* [1965] 1 LNS 171; *Jayaraman & Ors v. PP* [1982] 1 LNS 126; [1982] 2 MLJ 306; *PP v. Magendran Mohan* [2005] 3 CLJ 592). It was undisputed that the prosecution relied on circumstantial evidence and the learned trial judge had convicted the appellants based on circumstantial evidence.

[24] In *Sunny Ang*'s case (*supra*) the deceased's body was never found. The Federal Court held:

> … The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example – was it accident?

[25] The mother of the deceased, PW7 had testified that because of a custody tussle between her and the first appellant, the deceased was taken care by the first appellant from September 2013 until the day he died. This was also confirmed by the second appellant. On the day of the incident it was the first appellant who had brought the lifeless body of the deceased to the clinic. He claimed that he had picked up the deceased from the babysitter, Kak Maria. However, Kak Maria was not called as a witness to verify that she had indeed taken care of the deceased.

[26] PW2, the doctor at the clinic who had examined the deceased when he was brought to the clinic found several bruises on the deceased's body. So did PW8, the muezzin/the imam, who found several bruises on the deceased when he bathed the deceased's body in preparation for burial.

[27] The deceased's body was taken from the mortuary by the first appellant as he did not want a post-mortem to be conducted and wanted the burial of the deceased as soon as possible. The cause of death was not self-inflicted but head injury caused by a blunt object and not due to a fall from a bicycle. The inevitable conclusion therefore is that the death of the deceased was caused by the head injuries sustained by him.

[28] The learned trial judge had correctly applied the principles in *Virsa Singh* (*supra*) (refer to para. 62 of the grounds of judgment of the learned trial judge). To bring the case under s. 300 PC the prosecution must establish that:

A (i) a bodily injury is present;

(ii) nature of the injury purely on objective investigations;

(iii) there was intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and

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(iv) the injury of the type just described made up of three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

C **[29]** Once these four elements are established by the prosecution, the offence of murder under s. 300(c) PC is proved. After applying the principles as enunciated in *Virsa Singh* (*supra*) the learned trial judge evaluated the evidence and found that, given the evidence adduced, the prosecution had proven that the first appellant had the intention to inflict the injury and that the injury was sufficient to cause death in the ordinary course of nature under limb (c) to s. 300 of the PC:

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> [65] The opinion of SP5 was that the head injury sustained by the deceased was fatal in nature. The assessment of SP5 was that the injuries sustained over the head resulted in skull fracture, profound subdural haemorrhage and extensive brain swelling eventually leading to death.
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> E The injuries sustained were therefore sufficient to cause death in the ordinary course of nature. This is sufficient in order to satisfy the fourth condition enunciated in *Virsa Singh*.
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> [66] The intention of the accused persons that there was no intention to cause death or that there was no intention even to cause an injury of a
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> F kind that is sufficient in the ordinary course of nature did not matter. It did not even matter that there was no knowledge that an act of that kind will be likely to cause death. See *Virsa Singh* (*supra*). I therefore find that the prosecution had proven all the four elements set out in *Virsa Singh* (*supra*).

G **[30]** In *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579 it was held by the Federal Court that:

> [116] The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt. Conviction can be secured based
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> H on circumstantial evidence provided that:
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> (a) the circumstances from which the conclusion of guilt is to be drawn has been established;
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> (b) the facts so established is consistent with the hypothesis of the guilt; and
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(c) circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence (See *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, *Mazlan Othman v. PP* [2013] 1 CLJ 750; [2013] 1 AMR 615; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22).

[31] The trial judge acknowledged that the evidence is circumstantial as stated in his grounds of judgment:

> [104] It is not in dispute that the evidence in this case is not direct as there are no witnesses who saw any of the accused inflicting injury upon the deceased. However, even in the absence of direct evidence, a conviction can be secured through circumstantial evidence.
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> [105] Other than the case of *Public Prosecutor v. Azilah Hadri & Anor* (*supra*) already referred to, there is a preponderance of authority that convictions can be obtained by relying upon circumstantial evidence. The Court of Appeal case of *Yii Soon Ho v. Public Prosecutor* [2014] 1 LNS 386 considered the following main authorities on the subject, namely, *Sunny Ang v. Public Prosecutor* [1965] 1 LNS 171; *Jayaraman & Ors v. Public Prosecutor* [1982] 1 LNS 126; [1982] 2 MLJ 306; *Public Prosecutor v. Magendran Mohan* [2005] 3 CLJ 592; *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22; [1962] MLJ 307; *Karam Singh v. Public Prosecutor* [1967] 1 LNS 65; [1967] 2 MLJ 25; and *Chang Kim Siong v. Public Prosecutor* [1967] 1 LNS 18; [1968] 1 MLJ 36.

[32] The learned trial judge had taken into consideration the conduct of the first appellant in hastening the burial of the deceased and that the first appellant proceeded with undue haste to lodge a police report (P36) to place on record the fact that the deceased had died of asthma complications in order to obtain the burial permit. He also did not want the deceased to undergo a post-mortem. A conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. The Court of Appeal in *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] 1 MLJ 307 Thomson CJ observed:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[33] In this instant appeal we can only conclude that the cumulative effect of the evidence led to an irresistible conclusion that the first appellant had without a doubt caused the death of the deceased.

[34] As far as the second appellant was concerned, the only evidence that connected her with the deceased is the presence of 'U' shaped bite marks on both arms of the deceased. This was the evidence coming from PW10, the orthodontist. According to PW10, the bite marks on the left arm of the deceased corresponded to the crown pattern of the teeth of the second appellant. It was also PW10's opinion that the force exerted by the bite was with some degree of force which eliminated the possibility that the bite mark was a result of a playful bite or one done out of affection.

[35] Although there is evidence from PW10 that the bite marks point to the second appellant, the cause of death of the deceased was not due to bite marks but the trauma to the head due to a blunt object. We are mindful that the charge against the second appellant is that of murder.

[36] The learned trial judge acknowledged that the case of the prosecution is based on circumstantial evidence, which the learned trial judge found that it is sufficiently strong enough to form a conviction against both the appellants for the offence of murder under s. 302 of the PC. Although we agree with the findings of the learned trial judge as far as the first appellant is concerned, however, we disagree with the findings by the learned trial judge against the second appellant.

[37] We found that there is no evidence, be it direct nor circumstantial, to link the second appellant to the injuries which caused the death of the deceased. It has not been established that the second appellant stayed/lived with the first appellant or that she was also involved in taking care of the deceased at the material time.

[38] It is to be noted that the charge against the second appellant is under s. 34 of the PC, namely common intention to commit murder. The learned trial judge did not consider this aspect of the charge, and neither was there any findings as to whether the elements of "common intention" was satisfied.

[39] As there is no evidence to link the second appellant to the injuries which caused the death of the deceased, and there is no evidence of any common intention of the second appellant together with the first appellant in committing the act of murder, it is our view that the learned trial judge had erred in convicting the second appellant of the charge preferred. The circumstantial evidence relied on by the prosecution in respect of the second appellant, merely raised suspicion and doubts. It is trite principle of law that suspicion, no matter how grave, is insufficient to form a conviction.

Failure To Invoke Adverse Inference Under The Provision Of s. 114(g) Of The Evidence Act 1950 For The Failure Of Investigation Of The Existence Of "Kak Maria"

[40] Learned counsel for both appellants argued that the learned trial judge failed to invoke s. 114(g) of the Evidence Act 1950 for the failure by the prosecution to call Kak Maria, the babysitter. The investigating officer, DSP Mohd Zaki bin Asahar ("PW13") testified that there was no investigation conducted at all on the person named Kak Maria despite the fact that the first appellant had stated in evidence that she was the person who had taken care of the deceased when he was at work. Save and except for the evidence from PW13 during cross-examination when he attempted to explain the reason for not investigating Kak Maria as follows:

> Kak Maria tidak perlu dalam siasatan kerana penjagaan terhadap simati telah terlalu lama.

(See p. 342, rekod rayuan, jilid 2(1)).

[41] It is the defence's contention that the failure of the prosecution in calling Kak Maria justifies the invocation of s. 114(g) of the Evidence Act 1950 against the prosecution's case.

[42] From the grounds of judgment of the trial judge, His Lordship had considered this issue and found that there is no merit in the contention of the defence that Kak Maria was to be blamed for the injuries that led to the death of the deceased, and that the said Kak Maria was essential to the unfolding of the prosecution's case.

[43] We are of the view that the learned trial judge did not err in this respect as His Lordship had considered the evidence from the mother of the deceased, PW7, that the deceased was in the care of the first appellant from September 2013 until the time of his death. Although PW7 did admit in evidence that the deceased had been initially in the care of Kak Maria when the deceased was under her custody and that Kak Maria babysit the deceased whilst she (PW7) was at work. During the period when the deceased was under the care of Kak Maria, save and except one occasion when the deceased was scratched by a cat, there had never been any incident where the deceased suffered any cuts, injuries or any "lebam-lebam" on his body. PW7 categorically and firmly stated in evidence that after the first appellant took custody of the deceased in September 2013 onwards, Kak Maria no longer babysit the deceased (refer to p. 74, of rekod rayuan, jilid 1). It was also in evidence by PW7 that she had difficulty getting the deceased to spend the time with her during those period when the deceased was in the first

appellant's custody. It was then that PW7 decided to engage a lawyer to get custody of the deceased but she was too late when the deceased died in the care of the first appellant. PW7 was never challenged by the defence on this piece of evidence, namely that the deceased was not in the care of Kak Maria at the material time.

[44] In addition, the appellants had never informed to the police during investigation that the deceased was taken care by Kak Maria at the material time.

[45] As it is the case of the defence that Kak Maria was babysitting the deceased at the relevant time, it is for the defence to call Kak Maria to prove their case.

[46] The learned trial judge further considered the possibility of Kak Maria causing the injuries on the deceased in his grounds which we reproduced for clarity:

> [111] If the deceased had been in the care of the said Kak Maria, it begs the question of why the First Accused had not inquired from her as to the cause of the multiple bruises on the body of the deceased. There was also no evidence that any police report was lodged by the First Accused regarding the injuries sustained by the deceased attributing the same to the said Kak Maria if indeed he thought that she was responsible for the injuries.
>
> [112] There was also no evidence that the deceased was brought to the hospital or clinic in order to treat his multiple injuries. The evidence of these multiple injuries as gathered from the testimonies of SP2, SP4 and SP8 was overwhelming. The evidence of these injuries on the deceased's body could not have escaped the attention of the First Accused. The inaction on the part of the First Accused speaks volumes as to his complicity in the death of the deceased.
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> [113] From a consideration of the above, I therefore found that there is no merit to the submission attributing the cause of the deceased's death to the said Kak Maria. I find that the prosecution had sufficiently proven that the deceased was not in fact in the care of the said Kak Maria prior to the death of the deceased but rather in the care of the First and second Accused from September 2013 until the date of his death.

[47] Given the aforesaid, we are of the view that the learned trial judge did not err when he found that the issue on s. 114(g) of the Evidence Act 1950 on the failure to call Kak Maria, has no leg to stand on.

[48] For the reasons we have stated above we find no merits in the appeal of the first appellant. Therefore we dismissed the first appellant's appeal (J05(M)-142-04-2017). The learned Judicial Commissioner's decision is affirmed.

[49] However, in the appraisal of the evidence of the prosecution and the defence in respect of the second appellant, we found that there is appealable error on the part of the learned trial judge in convicting the second appellant. The second appellant has successfully raised reasonable doubt on the prosecution's case. We found that it is unsafe to convict the second appellant on the charge under s. 302 PC read together with s. 34 PC. We allowed the appeal (J05(M)-144-04-2017) of the second appellant. The conviction and sentence of the second appellant by the learned High Court Judge is set aside. The second appellant is discharged and acquitted.

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